

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Robert G. Taub, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Nanci E. Langley

Rules Pursuant to 39 U.S.C. §404a

Docket No. RM2013-4

Public Representative Comments

(July 29, 2013)

On June 5, 2013, the Commission issued a notice of proposed rulemaking to establish rules pursuant to 39 U.S.C. § 404a.<sup>1</sup> In its notice, the Commission established the present docket, appointed the undersigned to act as an officer of the Commission representing the interests of the general public, and invited interested persons to submit comments no later than 45 days from the date of publication in the Federal Register. Order No. 1739 at 23. Reply comments are due no later than 75 days from the date of publication in the Federal Register. *Id.* The proposed rules were published in the Federal Register on June 14, 2013.<sup>2</sup> Comments are according due July 29, 2013 and reply comments are due August 28, 2013.

Congress has ordered the Commission to prescribe rules implementing section 404a of title 39. Though the statute does not specify whether the rules are to be

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<sup>1</sup> Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, June 5, 2013 (Order No. 1739).

<sup>2</sup> 78 Fed. Reg. 35826, June 14, 2013.

substantive or procedural in nature, the Commission has proposed rules that have substantive and procedural components. The proposed substantive rules are primarily set out in four proposed sections – 3032.5 through 3032.8. The narrative preamble that accompanies the rules provides further guidance as to how the Commission intends to interpret those rules. The remaining provisions in the proposal are procedural in nature and act as supplements to rules already in place to govern complaint proceedings.

The Public Representative generally supports the Commission’s endeavor to provide new procedures to expedite 404a complaints. However, as explained below, the 404a rules should be exclusively substantive in nature. Efforts to improve the complaint process should be part of broader initiative to devise comprehensive procedures for the Commission’s handling of complaints rather than a piecemeal effort that applies only to 404a complaints. The Commission will be best served in this docket by focusing its energy in devising substantive rules that provide clear substantive guidance on complaints brought pursuant to 39 U.S.C. § 404a.

Part I of these comments discusses the relevant statutory framework. Part II examines the substantive aspects of the proposed rules. Part III examines the procedural aspects of the proposed rules.

## I. THE STATUTORY FRAMEWORK

In enacting the Postal Accountability & Enhancement Act (PAEA), Public Law No. 109-435, 120 Stat. 3218 (2006), Congress prohibited the Postal Service from, *inter alia*, using its sovereign privilege to engage in certain activities detrimental to the competitive marketplace. Specifically, section 403 of the PAEA created section 404a of title 39. *Id.* § 403(a). That same provision conditioned the Postal Service’s exercise of the general and specific powers that Congress previously granted to it in sections 401 and 404 of title 39 on compliance with section 404a. *Id.* § 403(b),(c). In other words, the Postal Service may only exercise the powers Congress granted to it under sections 401 and 404 if that exercise is consistent with section 404a.

Section 404a prohibits the Postal Service from engaging in three types of specified conduct, requires the Commission to prescribe implementing regulations, and

gives any party who believes that the Postal Service has violated section 404a the right to bring a complaint pursuant to section 3662. By initiating the instant proceeding, the Commission has started the process by which it will satisfy its mandate to prescribe implementing regulations.

## II. SUBSTANTIVE ASPECTS OF THE PROPOSED RULES

Section 404a prohibits the Postal Service from engaging in three types of conduct.

(a) Except as specifically authorized by law, the Postal Service may not—

(1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;

(2) compel the disclosure, transfer, or licensing of intellectual property to any third party (such as patents, copyrights, trademarks, trade secrets, or proprietary information); or

(3) obtain information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

Section 404a(a)(2) ensures that entities that provide sensitive information to the Postal Service can do so without fear that the sensitive information will be shared with competitors. The Commission faithfully implements the substance of this subsection in

proposed section 3032.6.<sup>3</sup> It asserts that this provision shields parties who interact with the Postal Service from threats to their intellectual property. Order No. 1739 at 9. Section 404a(a)(3) prohibits the Postal Service from using information that it obtains from a person in postal services that it offers, unless the provider consents or the information can otherwise be obtained from an independent source. The Commission faithfully implements the substance of this subsection in proposed section 3032.7. Subsection (c) of the proposed rule incorporates procedural safeguards to ensure that consent is informed. The Public Representative supports the substantive portions of the Commission's proposed rules implementing each of these two provisions.<sup>4</sup> The substantive comments below therefore focus exclusively on the proposed implementation of subsection 404a(a)(1).

#### A. Section 404a(a)(1) Overview

In interpreting section 404a, these comments rely exclusively on the language that Congress used when it enacted the PAEA. By its terms, section 404a(a)(1) prohibits the Postal Service from establishing rules, regulations, or standards that have the effect of precluding or establishing the terms of competition unless the Postal Service can show that the rules, regulations, or standards do not create an unfair advantage for it.

It is important to understand this provision in its context. The Postal Service acts in a sovereign capacity as a regulator. In some competitive areas, it also acts as a market participant. Section 404a(a)(1) recognizes that there is a tension and the potential for abuse when the market regulator is also a competitor. It accordingly

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<sup>3</sup> Subsection (c) indicates that the "term 'disclosure, transfer, or licensing of intellectual property' includes, among other things, an action that has an adverse effect on the value of intellectual property." It is not clear what this gloss on the statutory language adds to the rules. Whether the use of one's intellectual property by a third party has an adverse effect on the value of the property may be difficult to ascertain in some instances. The Postal Service itself is surely aware that the effect that a third-party use of its trademarks has can sometimes be ambiguous. See "Postal Service Tale: Indie Rock, Snail Mail, and Trademark Law," Ben Sisario, N.Y. TIMES, Nov. 6, 2004. Although the proposed subsection (c) is harmless, the inquiry into the effect of the disclosure, transfer or licensing, is not relevant under the statute.

<sup>4</sup> Each of the proposed rules contains a jurisdictional provision limiting who may file a complaint. This procedural aspect of the rules is discussed in Part III, below.

prohibits the Postal Service from using its regulatory arm to distort competitive markets to its advantage.

The Commission proposes to implement the substantive portions of section 404a(a)(1) in proposed 38 C.F.R. § 3032.5, a provision entitled “unfair competition.”<sup>5</sup> Order No. 1739 at 26. The proposed section requires a complainant to show that a rule, regulation, or standard has the effect of precluding competition or establishing the terms of competition. *Id.* The proposed section permits the Postal Service to show, as an affirmative defense, that the rule, regulation, or standard does not create an unfair advantage to it. *Id.* Subsection (c) provides that “rule, regulation, or standard” includes “among other things, documents or policies issued by the Postal Service.” In the preamble to the proposed rules, the Commission offers additional guidance as to how it intends to interpret section 404a(a)(1).

The Public Representative believes that the proposed section should be amended in two ways. First, it should treat the Postal Service’s showing that a rule, regulation, or standard does not create an unfair advantage to it as a rebuttable defense rather than an affirmative defense.<sup>6</sup> Second, it should permit complainants to bring claims pursuant to section 404a(a)(1) in instances in which the Postal Service’s entry into a competitive market has the effect of precluding or establishing the terms of competition. The comments below elaborate on these points and address the substantive issues raised in the preamble.

## B. Similar Agency Statutes and Rules

The Commission indicates that it intends, as a matter of policy, to draw upon analogous contexts in which other federal administrative agencies review allegations of unfair competitive behavior. See Order No. 1739 at 6-7. The Commission cites the Cable Television Consumer Protection and Competition Act of 1992, which prohibits

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<sup>5</sup> The title “Unfair Competition” is not as accurate as it could be. Rule 404a(a)(1) prohibits the establishment of rules, regulations, and factors that preclude or establish the terms of competition. “Regulations that Preclude Competition,” “Preclusive Regulations,” for “Forbidden Regulations” are more accurate titles.

<sup>6</sup> Section 3032.5, as proposed, also contains a jurisdictional provision limiting who may file a complaint. This procedural aspect of the rules is discussed in Part III, below.

cable operators from engaging in “unfair methods of competition or unfair or deceptive acts or practices. . .” 47 U.S.C. § 548(b), as well as Federal Communications Commission implementing regulations, which provide a means for aggrieved parties to obtain redress for competitive injuries caused by unfair conduct. 47 C.F.R. § 76.1000 *et seq.* The Commission also cites section 5 of the Federal Trade Commission Act, which prohibits, “unfair methods of competition . . .” 15 U.S.C. § 45(a).

The experiences of federal agencies charged with regulating fair competition in their respective spheres may provide some useful guidance to the Commission when it considers complaints brought pursuant to section 404a(a)(1). In doing so, the Commission will need to be mindful of three important limitations. First, in the statutes that it cites, Congress used language that is different than the language that it used in section 404a(a)(1). The Commission should not assume that when Congress prohibits “unfair methods of competition” it means the same thing as when it prohibits rules, regulations, or standards “the effect of which is to preclude competition or establish the terms of competition.” Second, the Commission will need to keep in mind that the language Congress used in each statute addresses the specific needs of the respective agencies. Section 404a(a)(1) places a prohibition on the Postal Service’s regulatory acts when they affect competition. The Federal Communications Commission and Federal Trade Commission regulate the commercial activities of private actors in the market place.

### C. The Rule-of-Reason Analysis

The bedrock of competition law in the United States is the Sherman Antitrust Act of 1890, section one of which prohibits “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade. . .” 15 U.S.C. § 1. The Supreme Court has long recognized that the language of Sherman Act cannot be interpreted literally, as to prohibit “every” contract that restrains trade, because “[e]very agreement concerning trade, every regulation of trade, restrains.” *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Instead, drawing upon common-law precedents that antedate the Sherman Act, the Court has analyzed most antitrust claims using a “rule of

reason.”<sup>7</sup> See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978). Under this approach, courts ask whether the challenged acts “were unreasonably restrictive of competitive conditions.” *Standard Oil Co. v. United States*, 221 U.S. 502, 515 (1911).

In its preamble, the Commission proposes to use a burden shifting framework analogous to the framework that courts use for Sherman Act claims when it evaluates complaints brought pursuant to section 404a(a)(1). Order No. 1739 at 7-8. It asserts that complainants will be required to demonstrate that the Postal Service by “action or inaction” “precludes competition” or “establish[es] the terms of competition.” Order No. 1739 at 7. The burden then shifts to the Postal Service to show, as an affirmative defense, that the conduct at issue “does not create an unfair competitive advantage.” *Id.*

The Commission intends, as a matter of policy, to draw upon similarities between section 404a(a)(1) and federal statutes concerning unfair methods of competition. *Id.* In Sherman Act litigation, a defendant is given the opportunity to rebut a plaintiff’s claim by showing that the conduct complained of has a sufficient precompetitive justification, such as greater efficiency or enhanced consumer appeal. *Id.* at 8. If the defendant makes this showing, the burden shifts back to the plaintiff to show that the anticompetitive harm outweighs the precompetitive benefit. *Id.*

The burden shifting framework that courts use in Sherman Act litigation provides a useful analogue for 404a(a)(1) complaint proceedings. Section 404a(a)(1) permits the Postal Service to demonstrate that the regulation complained of does not create an unfair advantage to itself. The touchstone of this inquiry is whether the regulation at issue is “unfair.” Determining whether a regulation is fair invites the Commission to engage in a nuanced inquiry that considers possibly several factors, depending on the circumstances. To show that a regulation is not unfair, the Postal Service should be required to show that the disputed regulation serves some legitimate regulatory purpose. This is analogous to the “precompetitive justification” that defendants can offer in Sherman Act litigation. Like the plaintiff in Sherman Act litigation, the

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<sup>7</sup> Restraints that have a predictable and pernicious anticompetitive effect and limited potential for precompetitive benefit are deemed unlawful *per se*. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

complainant should then be permitted to rebut the Postal Service's defense by demonstrating that the regulation's anticompetitive harm outweighs the regulatory benefit of the regulation. A complainant might make this showing, for example, by demonstrating that the same regulatory benefit could be accomplished through means that cause substantially less harm to competition.

Proposed section 3032.5(b) treats the Postal Service's showing that the regulation does not create an unfair competitive advantage as an affirmative defense. An affirmative defense is a "defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or the prosecution's claim, even if all of the allegations in the complaint are true." BLACK'S LAW DICTIONARY (7<sup>th</sup> ed. 1999) at 430. Under the proposed rule, the complainant has no opportunity to rebut the Postal Service's assertion. This would tend to unduly stunt the fairness inquiry that section 404a(a)(1) invites. The Commission should amend section 3032.5(b) so as to make the Postal Service's showing that the regulation at issue has a does not create an unfair competitive advantage merely as a defense. A new subsection should be added to permit the complainant to overcome this defense by showing that the competitive harm to the market outweighs the regulatory benefit of the rule, regulation, or standard.

#### D. Harm to Competitors

The Commission cites the decision of the Court of Appeals for the District of Columbia in the Microsoft antitrust litigation for the proposition that, in analyzing whether conduct unreasonably restrains competition, courts focus on "anticompetitive effects" of an action and that "harm the competitive process" rather than harm to competitors is sufficient. Order No. 1739 at 7 (citing *United States v. Microsoft Corp.*, 253 F.3d 58 (D.C. Cir. 2001)). The Public Representative does not believe that the Commission should apply this interpretation of the Sherman Act to section 404a(a)(1).

Section 404a(a)(1) is written in broad terms. It prohibits the Postal Service from enacting regulations that "the effect of which is to preclude competition or establish the terms of competition." Nothing in this language precludes the Commission from considering the harm that a regulation causes to the entities that compete against the



Postal Service. And nothing in this language suggests that Congress was expressing special solicitude for consumers rather than competitors.

Differences between the Sherman Act case and section 404a(a)(1) demonstrate why the harm to competitors does not matter in the former context but should in the latter. In the context of the Sherman Act, the Supreme Court has explained that:

The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). If the courts police the competitive conduct of market participants too closely, they run the risk of chilling competition. By requiring claimants to show harm to consumers rather than competitors, courts are able to policing against market failure without unduly chilling competitive behavior.

Section 404a(a)(1) differs most dramatically from the Sherman Act in the focus of its inquiry. While the Sherman Act examines competitive behavior, section 404a(a)(1) examines regulations. The balance that courts need to strike between promoting competition while preventing the destruction of competition is not present when the Commission examines the Postal Service's regulations. The D.C. Circuit's suggestion that a showing of harm to competitors is insufficient for a Sherman Act claim is therefore inapt in the context of a section 404a(a)(1) complaint. The Public Representative recommends the Commission not to adopt a limitation that precludes competitors from showing a violation of section 404a(a)(1) has occurred solely by reference to harm to the Postal Service's competitors.<sup>8</sup>

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<sup>8</sup> As a practical matter, in most cases, if a regulation precludes competition because of the harm it inflicts on competitors, the public too, stands to lose.

E. The Scope of Section 404a(a)(1)

The scope of section 404a(a)(1) extends to “any rule or regulation (including any standard) that the Postal Service “establish[es].” In proposed section 3032.5(c), the Commission indicates the term “rule, regulation, or standard” includes “among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity.” Order No. 1739 at 26. The Public Representative believes that the Commission’s interpretation of the scope of section 404a(a)(1) vitiates the broad language that Congress used, particularly the words “any standard.”

In the preamble, the Commission suggests that it will interpret the scope of section 404a(a)(1) to include “action or inaction” that precludes competition or establishes the terms of competition. Order No. 1739 at 7. However, in the proposed rule, the Commission requires complainants to allege that a “rule, regulation, or standard” precludes competition or establishes the terms of competition. For the Commission’s regulations to be as effective as possible, they should also permit a complaint to be brought if the Postal Service engages in a “dormant” violation of section 404a(a)(1) by entering into competition in a market that it currently regulates. From the perspective of competitors in a market that the Postal Service regulates, regulations do not distort competition provided they are applied to all market participants equally. If the Postal Service decided to enter the markets, unless it subjects itself to the same regulations, it is possible that it could distort the existing market and preclude competition. By entering the market, the existing regulations could have the effect of precluding or establishing the terms of competition. The Public Representative believes that proposed section 3032.5 should be amended so as to permit complainants to bring “dormant” section 404a(a)(1) claims in instances in which the Postal Service’s entry into a competitive market has the effect of precluding or establishing the terms of competition.

### III. PROCEDURAL ASPECTS OF THE PROPOSED RULES

The Commission's rules for complaints brought pursuant to 39 U.S.C. § 3662 are presently set forth at 39 C.F.R. Part 3030. Among other things, those rules apply to proceedings brought pursuant to 39 U.S.C. § 404a. The complaint rules indicate that the Commissions' rules of practice and procedure, which are set forth at 39 C.F.R. Part 3001 apply to complaint proceedings "unless otherwise stated in [Part 3030] or otherwise ordered by the Commission." 39 C.F.R. § 3030.1.

In this proceeding, the Commission proposes to introduce new procedural rules that will apply exclusively to proceedings brought pursuant to 39 U.S.C. § 404a. The proposed rules would comprise parts 3032 and 3033. The proposed procedural rules consist of two main parts. Section 3032.15 permits parties to take depositions pursuant to rule 30 of the Federal Rules of Civil Procedure in proceedings in which the Commission determines that a complaint raises material issues of law or fact. And section 3033 permits parties to elect to proceed under a code pleading regime using accelerated procedures. The proposed accelerated 404a rules provide that "unless otherwise ordered by the Commission" a list of the Commission's rules of practice and procedure apply to proceedings brought thereunder.

#### A. The Procedural Rules

For complaints brought exclusively pursuant to section 404a, part 3033 provides optional rules for accelerated proceedings. Complainants who elect not to proceed under part 3033 are subject to the ordinary complaint procedures contained in part 3030 apply. Order No. 1739 at 29. Section 3033.1 prohibits motion practice in the accelerated proceedings except in "extraordinary circumstances." *Id.* at 30. Sections 3033.5 and 3033.6 implement what is essentially a code pleading regime, requiring that complainants to plead facts that are supported by evidence in the form of affidavits, declarations, or documentation. *Id.* at 30-32. Sections 3033.7 and 3033.8 require the Postal Service to file an answer within 20 days of service, raising legal defenses and pleading facts with evidence. *Id.* at 32-33. Section 3033.8 permits the Postal Service to

file a motion to dismiss in lieu of an answer within 10 days after the complaint is filed.<sup>9</sup> *Id.* at 33. Section 3033.9 indicates that the complainant has 10 days to respond to any affirmative defenses that the Postal Service raises, again with facts supported by evidence. *Id.* at 34. Section 3033.10 reiterates that all pleadings must allege facts and be supported by evidence. *Id.* at 34-35. Section 3033.11 allows for intervention by motion where it is necessary to protect an intervenor's interest. *Id.* at 35. That section also allows for the participation of a public representative. *Id.* at 36. Section 3033.15 requires the Commission to issue a final order on a complaint no later than 90 days after the complaint is filed. *Id.* at 37.

The Public Representative supports the Commission's efforts to overhaul its rules so that complaints brought pursuant to 39 U.S.C. § 404a can be resolved expeditiously. The optional rules for accelerated proceedings would permit parties in cases involving a relatively simple set of facts, to have their complaint resolved within 90 days. Accelerated proceedings will be particularly valuable to parties claiming ongoing damages.<sup>10</sup> The addition of depositions in non-accelerated proceedings may add some efficiency to those proceedings as well. Adoption of the Commission's proposed rules would present a good first step in the direction of making complaint proceedings more efficient. However, as described in detail below, the Commission has the power to do more. The comments that follow first address procedural issues that pertain to complaint proceedings generally, and then address specific issues that pertain to the proposed rules.

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<sup>9</sup> The proposed rules make service the triggering event that starts the clock for the Postal Service to file an answer and the filing of the answer is the triggering event that starts the clock for the Postal Service to file a motion to dismiss. Service should be the triggering event for both.

<sup>10</sup> For parties claiming ongoing damages, the Commission might also consider rules that provide for injunctive relief similar to that provided by Federal Rule of Civil Procedure Rule 65. Under that rule, a party can obtain immediate relief if it can show (1) the likelihood of success on the merits of its claim, (2) the likelihood of irreparable harm in the absence of an injunction, (3) the inadequacy of monetary damages, and (4) that the balance of hardships favors the party seeking the injunction. See *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

## B. The Overlapping Procedural Rules for Complaints

Section 3662 of Title 39 permits any interested person to who believes that the Postal Service is not operating in conformance with the requirements of “sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter” to file a complaint with the Commission “in such form and manner as the Commission may proscribe.” Pursuant to this authority, in 2009 the Commission promulgated a set of procedural rules governing complaints and rate and service inquiries. 74 FR 16744 (Apr. 10, 2009); 74 FR 16746 (Apr. 10, 2009). Those rules, which are codified at 39 C.F.R. Parts 3030 and 3031, supplement to the Commission’s rules of practice and procedure, which are codified at 39 C.F.R. Part 3001. The rules of practice and procedure were written in 1971, long before the enactment of the Postal Accountability and Enhancement Act (PAEA). 36 FR 396 (Jan. 12, 1971). And although those rules have been periodically amended, they are not well suited to accommodate complaints brought pursuant to section 3662. For example, the practice and procedure rules contain complicated discovery and hearing procedures. See 39 C.F.R. §§ 3001.25-28, 3001.30. And the evidence rule, which takes up nearly six pages in the Federal Register, presupposes evidence that is technical in nature. See C.F.R. § 3001.31. While these rules may be well-tailored to accommodate parties that regularly come before the Commission in rate proceedings, their complexity is not well-tailored for the small business owner whose trade is adversely affected by a Postal Service regulation and who seeks to bring a simple complaint.

The rules for complaints provide additional procedural rules that apply exclusively to proceedings brought pursuant to section 3662. Among other things, the complaint rules prescribe the contents of pleadings and the form of service. 39 C.F.R. §§ 3030.10-14. The complaint rules provide that once the Commission determines that a complaint raises a material issue of law or fact, the rules of practice and procedure apply. 39 C.F.R. § 3030.1(a).<sup>11</sup> Under the current rules, a party seeking to bring a complaint, must first consult with the complaint rules to determine the form that the

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<sup>11</sup> Specifically, the rules of general applicability, 3001 subpart A, apply. The rules applicable to requests for changes in the nature of postal services, 3001 subpart D, do not apply.

pleading must take and the manner of service. Among other things, the complainant must, without the aid of most discovery tools, describe that nature of the evidence that they have or expect to obtain during the proceeding. 39 C.F.R. § 3030.10(a)(5).<sup>12</sup> The Commission has 90 days to determine whether the complaint states a material issue of fact or law. 39 C.F.R. § 3030.30 If it does, the proceeding continues under the rules of practice and procedure.

Section 404a(b) requires that the Commission “prescribe regulations to carry out this section.” 39 U.S.C. § 404a(b). Section 404a(b) does not indicate whether those regulations should be procedural or substantive in nature. Given that the Commission already has already prescribed rules specifically tailored for complaint proceedings, the Commission could satisfy section 404’s mandate by prescribing substantive regulations that establish the claims and defenses applicable to 404a complaints.

The proposed 404a rules add additional procedural provisions, including accelerated proceedings with new pleading standards, a motion to dismiss, a deposition procedure, and a procedure for intervention. The Public Representative believes that each of these provisions can improve the complaint process by enabling parties to resolve complaint proceedings more efficiently.

However, for the party bringing a complaint pursuant to section 404a, the rules will become more complicated. A complainant who reasonably consults the Commission’s rule for complaints before filing a complaint, may be surprised to learn that separate rules permit them to elect to choose accelerated procedures. Moreover, a complainant wishing to know how the 404a rules harmonize with the rules of practice and procedure will need to contend with the following provision:

Unless otherwise stated in this part or otherwise ordered by the Commission, §§ 3001.1, 3001.5- 3001.15, 3001.21, 3001.23, 3001.32, 3030.2, 3030.11, 3030.30, 3030.31, 3030.40, 3030.41, and 3030.50 of this chapter apply to accelerated complaints filed under this part.

*Id.* at 29.

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<sup>12</sup> The rules for complaints indicate that the rules of practice and procedure pertaining to most discovery devices do not apply at the pleading stage. 39 C.F.R. § 3030.1(b). However, this exemption does not appear to apply to requests for admissions. *Id.*; 39 C.F.R. § 3001.28.

The benefits that expedited proceedings would bring to complaints brought pursuant to section 404a could apply to any complaint proceedings brought pursuant to section 3662. Limiting the accelerated procedures to one type of complaint and to the exclusion of all other types of complaints raises the question why they are being limited in this way and creates unnecessary complexity when complainants bring complaints pursuant to section 404a and other statutory provisions.

While supportive of the Commission's efforts to accelerate section 404a proceedings, the Public Representative believes that this is not the docket in which to make these changes. Rules of procedure, by their nature, must cover a number of topics, including jurisdiction, the content of pleadings, the form of notice, the method of service, motion practice, dispositive motions, the available discovery devices, the method for intervening, procedures during hearings, settlements, interim relief, and final remedies. Procedural rules can cover each of these subjects without being complex. The Public Representative believes that the procedural rules under which the public files a complaint with the Commission should be simple, accessible, plainly written, and easy to understand. It may be time for the Commission to consider whether the rules of practice and procedure, in their present form, are up to the task of handling complaint proceedings. If they are not, the rules of practice and procedure should be amended or a separate and comprehensive set of complaint rules should be adopted. In either case, the rules should apply equally to all complaints brought pursuant to section 3662.

### C. The Jurisdictional Threshold

The proposed rules, at sections 3032.5(a)(2), 3032.6(a), 3032.7(a) each contain a jurisdictional threshold that complainant was harmed by the conduct complained of. Order No. 1739 at 26-27. Similarly, only interveners who are directly impacted by a decision on the merits and whose intervention is necessary to protect their interests are permitted to intervene. *Id.* at 35. The merit of these jurisdictional thresholds is that they will preclude complaints from persons who have no tangible interest in the outcome of the proceedings. However, it may unduly discourage interested individuals or organizations from bringing meritorious complaints.

For example, entities that are harmed by violations of section 404a(a)(1) are, by definition, entities subject to the Postal Service's regulatory authority. Burdened with an unlawful regulation, the regulated entity faces a Morton's fork. It can bring a complaint with the Commission seeking to have the unlawful burden lifted. The regulated entity may be reasonably hesitant to do so however, out of fear that the regulator could punish it with more burdensome regulations or through less formal means. Alternatively, the regulated entity could accept the unlawful burden in the hope that another regulated is brave or foolish enough to challenge to the regulator. The limitation on intervention raises additional issues. By limiting the intervention to parties that are actually impacted by the Postal Service's action, the proposed rules would ensure that interveners are only intervening when a complaint will have a direct impact on their interests.

As a solution to this collective action problem, the regulated entities, if they are organized and their interests align, could band together and form a trade group. Or, if the formation of a trade group is not possible, either do to a lack of interest, communication failures, or the non-alignment of interests among the putative group members, the regulated entity could seek to channel their concerns by making common cause with organizations that represent the interests of the public or consumers. The public interest organization, though not necessarily harmed by the regulations, may have an interest in ensuring that the Postal Service does not violate section 404a. Under the proposed rules, it is unclear whether the trade organization has third party standing to bring a complaint on behalf of its members. Perhaps the organization can claim harm on behalf of its members. The public interest organization, if it was not itself harmed, would not appear to have standing under the Commission's proposed rules.

The Public Representative does not support the imposition of a threshold standing requirement. Section 404a is written in prohibitory terms. It lists a series of actions that the Postal Service may not undertake. If the Postal Service engages in prohibited conduct, 39 U.S.C. § 3662 provides that "any interested person" may lodge a complaint with the Commission. Section 404a is unique in that provides a remedy that vindicates the interests of parties who are often at the mercy of the Postal Service's regulatory authority. By limiting access to the complaint process to persons who have



been harmed, the Commission creates a risk of discouraging meritorious complaints from being brought.

#### D. The Deposition Rule

In its proposed section 3032.15 the Commission provides that “participants may take depositions in accordance with Federal Rule of Civil Procedure 30.” Order No. 1739 at 28. The Commission indicates it anticipates that “depositions will expedite the discovery process since responses to oral questions posed during depositions allow for immediate follow up.” *Id.* at 18.

While it may be tempting to adopt the familiar Federal Rules of Civil Procedure, before doing so, the Commission needs to take account of the interlocking nature of those rules and the adversarial context in which judicial procedures operate.

Rule 30 contains detailed provisions, many of which will prove burdensome in practice. For example, it permits a party to depose “any person.” Fed. R. Civ. P. Rule 30(a)(1). Parties to litigation frequently depose third-parties with remote or non-existent interests in a dispute. The power to compel a party to attend a deposition comes from the court’s power to issue a subpoena under rule 45 *Id.* Rule 30 depositions also permit the party requesting the deposition to accompany the request with a request for the production of documents. Fed. R. Civ. P. Rule 30(b). Document requests can be burdensome, time-consuming, and wholly at odds with the Commission’s desire to expedite the discovery process. The scope of deposition testimony, like all civil discovery, is limited by rule 26 to requests “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. Rule 26(b). Admissibility, in turn, is governed by the Federal Rules of Evidence. In sum, while the Commission may want to borrow aspects of rule 30, wholesale adoption of that rule would invite the Commission into a procedural thicket it is better to avoid.

The Commission should adopt a rule that permits parties to take oral depositions. As the Commission notes, oral depositions would enable the parties to accomplish in a one day what presently takes weeks. Before adopting an oral deposition procedural rule, the Commission should consider important issues, such as who can be deposed

and for how long, whether depositions can be coupled with document requests, and the conditions under which a deponent can refuse to answer a question.

#### E. Issues that Merit Further Consideration in Accelerated Proceedings

The rules leave a number of important questions unanswered with respect to how the expedited proceedings will operate. Proposed section 3033.1 indicates that a complainant filing using the accelerated rules may only “make claims arising under 39 U.S.C. section 404a and associated regulatory requirements.” Order No. 1739 at 29. This limitation may impose an unworkable rule. For example, if a party claims that a Postal Service regulation precludes competition in violation of section 404a, the same nucleus of operative facts supporting that claim may also give rise to a claim under sections 401(2) and 403(c). Before bringing an accelerate claim under section 404a, a claimant would want to know whether doing so precludes him or her from bringing a future claim under section 401(2) and 403(c)?

By choosing the accelerated proceedings, what rights has a complainant relinquished? For example, suppose a complainant loses in an expedited proceeding but later discovers evidence that shows that the Postal Service has violated section 404a. Is the complainant prohibited from filing a subsequent claim based on new facts?

Or suppose two entities file complaints claiming that certain Postal Service regulations violate section 404a. If one claimant seeks expedited proceedings and the other does not, will both claimants be bound by an adverse decision in the expedited proceedings?<sup>13</sup> The Public Representative believes that the Commission should provide additional guidance to the public on these issues.

#### F. Rules with Potentially Harsh Consequences

A few of the proposed rules may operate in a manner that is unduly harsh.

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<sup>13</sup> This scenario raises the issue of joinder. Can or should the Commission join the proceedings if they arise from a single set of facts? If the cases are joined, which procedures should the Commission follow, accelerated or non-accelerated?

## 1. Deemed Admissions

Section 3033.9 of the proposed rules governing accelerated proceedings provides that the “[f]ailure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and any facts supporting such affirmative defense that are not specifically contradicted in the complaint.” This proposed rule could prove unduly harsh to an unwary or unsophisticated complainant.<sup>14</sup>

For example, a party could allege that a Postal Service regulation precludes competition in violation of section 404a(a)(1). The Postal Service could file a voluminous reply asserting a multitude of facts and raising several affirmative defenses. The Postal Service might assert that the regulation serves a legitimate regulatory purpose and offer facts supporting its claims. The complainant might believe that the regulation serves no legitimate regulatory purpose, however, the failure to file a reply and the failure to directly reply to this affirmative defense will be deemed an admission and the complaint will, in all likelihood be dismissed. Deemed admissions ensure that parties without legal counsel who bring 404a complaints before the Commission do so at their peril. The Public Representative recommends that this proposed rule on deemed admissions be excluded from the final rules.

## 2. Assertions Based on Information and Belief

The proposed rules require the parties to have all of the facts lined up prior to instituting the proceedings. These rules may prove useful to complainants who believe they have sufficient facts to prove a violation of section 404a and a need for expeditious resolution of the matter. Proposed section 3033.10 expressly prohibits the parties from making assertions based on information and belief (i.e. assertions lacking a factual foundation). While this rule will have the laudable effect of forcing the parties to stick to

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<sup>14</sup> In civil proceedings in the federal courts, if a party fails to deny an allegation or to claim a lack of knowledge sufficient to admit or deny an allegation, the allegation is deemed admitted. Fed. R. Civ. P. Rule 8(b). That rule should not be adopted by the Commission for two reasons. First, the Commission’s same rules expressly prohibit assertions based on information and belief. Second, the nature of administrative proceedings differs from an adversarial proceedings in that the rights of parties not before the Commission in the proceedings are at stake.

the facts in accelerated proceedings, in practice, it may operate a bit harshly. For example, a party may assert a claim based on correct information outside of its personal knowledge but within knowledge of the party responding to the pleading. If the assertion is true, the party responding to the assertion has an obligation to admit that the assertion is true. The Public Representative suggests that this provision not be included in the final rules.

#### IV. CONCLUSION

For the reasons provided, the Public Representative supports the Commission's efforts to expedite complaint proceedings. However, efforts to expedite such complaints should be done as part of a broader initiative to devise comprehensive procedures for complaints, rather than as a piecemeal effort to improve only the 404a complaint procedures. In the present docket, the Commission should focus exclusively on the substantive rules interpreting section 404a.

The Public Representative agrees with the Commission's substantive proposals, in sections 3032.6 and 3032.7, to implement section 404a's prohibitions against compelled disclosures of intellectual property and expropriations of information provided by third parties. The proposed regulation implementing the prohibition on rules that preclude or establish the terms of competition should be amended in two ways. First, when the Postal Service shows that a rule, regulation, or standard does not create an unfair advantage to it, that showing should be treated as a rebuttable defense. Second, parties should be permitted to bring complaints when the Postal Service's entry into a competitive market has the effect of precluding or establishing the terms of competition.

Respectively Submitted,

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